

STATE OF FLORIDA

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Commissioners:
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Public Service Commission

April 29, 1998

BY AIR BORNE EXPRESS

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Docket DA 98-682 - MCI Petition for Declaratory Ruling
CC Docket No. 96-45

Dear Ms. Salas:

Enclosed are an original and 11 copies of the Opposition of the Florida Public Service Commission in the above docket. Please date stamp and return one copy in the enclosed self-addressed envelope.

On April 22, 1998 the FPSC sent a letter to the FCC stating we would file these comments after our April 28th Internal Affairs, a noticed and public meeting. We also note the short deadline for filing comments in that the FCC's notice was released April 10, 1998. Per the FCC notice, we are filing these comments on diskette to Sheryl Todd of the Common Carrier Bureau.

Sincerely,

Cynthia B. Miller
Senior Attorney

CBM:jmb

cc: Sheryl Todd
Accounting Policy Division
International Transcription Service

At 10

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554**

DA 98-682
CC Docket No. 96-45

In the Matter of:)
)
Petition for Declaratory Ruling)
That Carriers May Assess Interstate)
Customers an Interstate Universal)
Service Charge Which is Based on)
Total Revenues)
_____)

**OPPOSITION OF THE
FLORIDA PUBLIC SERVICE COMMISSION**

On April 3, 1998, MCI filed a Petition for Declaratory Ruling (Petition), asking the FCC to find "that carriers are not precluded by the Universal Service Order from imposing a charge on interstate customers that is based on the customers' total billed revenues, including intrastate revenues, to recover federal universal service costs." (Petition, p. 1)

The Florida Public Service Commission (FPSC) opposes that petition. We believe that Section 2(b) of the Telecommunications Act precludes the FCC's jurisdiction over approving any intrastate surcharge. (47 C.F.R. 152(b)) Thus, the petition should be dismissed. In the alternative, the FCC must deny the petition for the reasons listed below.

Background

MCI is currently charging two fees to recover assessments for the federal Universal Service fund and for access charge

restructuring, which MCI calls the Federal Universal Service Fee (FUSF) and the National Access Fee (NAF), respectively. The NAF is intended to recover the amount of primary interexchange carrier charges (PICCs) assessed by the incumbent local exchange carriers (ILECS). Only the FUSF is addressed in MCI's Petition. On April 1, 1998, MCI began charging a flat-rated NAF.

The FUSF is an interstate charge that is designed to recover MCI's federal universal service fund contributions. MCI assesses small business customers 5 percent of their total MCI billed revenues, and large business customers are assessed 4.4 percent of their total MCI revenues.

MCI contends that the facts are not in dispute in this case. (Petition, p. 2) Rather, there is disagreement as to the appropriate application of the FUSF, specifically, whether the FUSF may be applied against intrastate revenues of interstate customers. In our view, the manner in which MCI is applying both the FUSF and the percentage-based NAF is contrary to the Order. Also, the characterization of the issue is mistaken. MCI is blurring the two very distinct concepts of an assessment methodology and actual recovery of monies.

MCI points out that the FCC's Universal Service Order¹ (Order) permits carriers to recover their contributions for federal universal service support only through rates on interstate services. MCI further quotes the Order as saying carriers are "permitted . . . to pass through their contributions to their interstate access and interexchange customers."² (Petition, p. 4) MCI argues that the FCC did not specifically address the issue of whether carriers could recover their universal service contributions through their federal tariffs based on customers' combined intrastate, interstate, and international revenues. MCI states that such an application would be a logical result of the FCC's decisions and is consistent with the FCC's rationale for determining the contribution base for federal universal service support. (Petition, p. 5)

Argument

First, MCI appears to argue that since federal universal service fund assessments are based on total revenues, it is thus reasonable for a carrier to recover such an assessment based on a

¹Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (released May 8, 1997).

²Id. at ¶829.

surcharge applied to total revenues. We also note that the FCC based only the assessment for schools, libraries, and rural health care providers on total revenues. The universal service fund assessment for high cost and low income programs is based only on interstate revenues.

Second, the FPSC objects to MCI's statement that its methodology is consistent with the Order. The company is actually applying a percentage charge to the customer's bill that is based on total revenue, in effect implementing an intrastate rate increase through an interstate tariff.

Additionally, we note that ¶829 of the Order which says that carriers are "permitted . . . to pass through their contributions to their interstate access and interexchange customers," makes no mention of intrastate customers. To determine that the word "interexchange" in this instance includes intrastate would place this paragraph directly in conflict with other portions of the Order, and beyond FCC jurisdiction.

MCI further states that the FCC responded to arguments that it does not have jurisdiction to assess intrastate revenues of interstate carriers, saying that it "merely is calculating a federal charge based on both interstate and intrastate revenues, which is distinct from regulating the rates and conditions of

interstate [sic] service."³ (Petition, p. 7) Later, MCI quotes ¶819 which states that

[t]here is no indication that Congress's authorization in section 254(f) of a separate support mechanism covering intrastate carriers evidences an intent that the amount of a carrier's contributions to the respective support mechanisms similarly should be based on the type of communications service, interstate or intrastate, provided by the carrier.⁴ (Petition, p. 6)

We note that ¶819 and ¶821 are part of a lengthy discussion in the FCC's Order titled "General Jurisdiction Over Universal Service Support Mechanisms." In the opening paragraph of that discussion, the FCC states

[W]e conclude that the [FCC] has jurisdiction to assess contributions for the universal service support mechanisms from intrastate as well as interstate revenues and to require carriers to seek state (and not federal) authority to recover a portion of the contribution in intrastate rates. Although we expressly decline to exercise the entirety of this jurisdiction, we believe it is important to set forth the contours of our authority in this Order.⁵

The entire discussion appears to be an exercise by the FCC to assert what it believes the extent of its authority would be should it choose to exercise it. Nowhere in the discussion can the FPSC find support for MCI's interstate fees levied on

³Id. at ¶821.

⁴Id. at ¶819.

⁵Id. at ¶813.

intrastate revenues. Rather, the FCC clearly would refer carriers to the intrastate jurisdiction for recovery of any portion of the contribution through intrastate rates. While the FCC has based an intrastate portion of the universal service fund assessment on total revenues, it clearly states in its Order that "[C]arriers may recover these contributions solely through rates for interstate services...."⁶ In another passage, it states:

We have determined to continue our historical approach to recovery of universal service support mechanisms, that is, to permit carriers to recover contributions to universal service mechanisms through rates for interstate services only. In discussing recovery we are referring to the process by which carriers recoup the amount of their contributions to universal service.⁷

In its Report to Congress, released April 10, 1998, the FCC reiterated that position, stating:

. . . [W]e reaffirm the Commission's decision to permit carriers to recover contributions for the support mechanisms for eligible schools, libraries and rural health care providers solely via rates for interstate services.⁸

The FPSC does not object to the use of total revenues as an assessable base. As stated in our January 27, 1997, ex parte comments to the FCC,

⁶Id. at ¶838 (emphasis added).

⁷Id. ¶ 825.

⁸Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, FCC 98-67 (released April 10, 1998).

[i]n theory, we could support an assessment on both inter- and intrastate revenues. Such a method combines fairness with simplicity, while not impairing the states' jurisdiction. (Comments, p. 2)

However, we do object to the FCC approving recovery of federal assessments from intrastate customers.

We note that, although the FCC has concluded in its Order that it has jurisdictional authority to require carriers to seek state approval to recover a portion of their contribution from intrastate rates, Florida and other states have previously taken the position that the FCC has no such authority. In the state petitioners' brief in the 5th Circuit Court of Appeals, which opposed certain provisions of the Order, state petitioners argued that the provisions of the Order that intrude on state authority over intrastate telecommunications should be annulled because there is no grant of such authority to the FCC.⁹ In addition to Section 2(b) of the Act, Section 254 itself supports the conclusion that the FCC lacks jurisdiction. Accordingly, we believe that the FCC has no authority to permit MCI to recover its contributions from intrastate revenues, or to require it to seek approval from the state to do so.

⁹ Texas Office of the Public Utility Counsel v. FCC, No. 97-60421 (5th Cir.).

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Conclusion

Based on the foregoing the FPSC urges that the FCC dismiss the petition. In the alternative, the FCC should issue a declaratory ruling finding that carriers may not recover universal service charges from interstate customers through assessments on intrastate revenues.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Cynthia Miller", is written over the typed name.

Cynthia Miller
Senior Attorney
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DATED: April 29, 1998

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Total Revenues)	
_____)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 29th day of April, 1998, a true
and correct copy of the foregoing Opposition of the Florida
Public Service Commission was furnished to the following parties:

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